

STATE OF MICHIGAN
COURT OF APPEALS

STATE FARM FIRE & CASUALTY
COMPANY,

Plaintiff-Appellant,

v

FORD MOTOR COMPANY,

Defendant-Appellee.

UNPUBLISHED
March 11, 2010

No. 287512
Livingston Circuit Court
LC No. 08-023590-NP

Before: Meter, P.J., and Murphy and Zahra, JJ.

ZAHRA, J., (*concurring*).

I concur in the result expressed in the majority opinion. I write separately because I conclude that this Court has improperly expanded the economic loss doctrine to consumer transactions. Rather than carve out yet another exception to the economic loss doctrine, as the majority opinion has in this case (economic loss doctrine does not apply to losses “not anticipated or contemplated” by the product purchaser), I would conclude that the economic loss doctrine simply does not apply to consumer transactions.

The Michigan Supreme Court adopted the economic loss doctrine in *Neibarger v Universal Coop, Inc.*, 439 Mich 512; 486 NW2d 612 (1992). In *Neibarger*, the plaintiffs were owners of a dairy farm who brought a product liability claim against the designers and installers of their milking system. The plaintiffs alleged the milking system was improperly designed and installed. As a result of the alleged negligence of the defendants, the plaintiffs’ herd was damaged. The plaintiffs brought suit within one year of discovering the damage to their herd, but more than four years after purchasing the milking system from defendants. The Supreme Court granted leave to consider the applicability of the economic loss doctrine, “which bars tort recovery and limits remedies to those available under the Uniform Commercial Code *where a claim for damages arises out of the commercial sale of goods and losses incurred are purely economic.*” *Neibarger*, 439 Mich at 515 (emphasis added). Our Supreme Court held “that where a plaintiff seeks to recover for economic loss caused by a defective product *purchased for commercial purposes*, the exclusive remedy is provided by the UCC, including its statute of limitations.” *Id.*, 527-28 (emphasis added). Thus, the Supreme Court concluded that the 4-year statute of limitation applicable under the economic loss doctrine barred the plaintiffs’ cause of action. The Supreme Court reasoned,

“[I]f a commercial purchaser were allowed to sue in tort to recover economic loss, the UCC provisions designed to govern such disputes, which allow limitation or elimination of warranties and consequential damages, require notice to the seller, and limit the time in which such a suit must be filed, could be entirely avoided. In that event, Article 2 would be rendered meaningless and . . . ‘contract law would drown in a sea of tort.’” [*Id.*, quoting *East River Steamship Corp v Transamerica Delaval Inc*, 476 US 858, 866; 106 S Ct 2295; 90 L Ed 2d 865 (1986).]

Notwithstanding that our Supreme Court adopted the economic loss doctrine in the context of a commercial transaction, this “Court has extended the economic loss doctrine beyond commercial transactions involving sophisticated users to the sale of consumer goods, even when the plaintiff consumer enters into a transaction with an entity of greater knowledge or bargaining power.” *Quest Diagnostics, Inc v MCI Worldcom, Inc*, 254 Mich App 372, 378; 656 NW2d 858 (2002) (footnote omitted). See *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41; 649 NW2d 783 (2002) (applying the economic loss doctrine to a consumer purchase of a boat). I conclude that this Court has improperly extended the economic loss doctrine to consumer transactions.

The economic loss doctrine . . . hinges on a distinction drawn between transactions involving the sale of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts. [*Neibarger*, 439 Mich at 520-521 (citations omitted).]

By extending the economic loss doctrine to the sale of a defective product to an individual plaintiff, this Court continues to render meaningless a significant portion of product liability tort law -- a result that is inconsistent with our Supreme Court’s reasoning in *Neibarger, supra*. I would limit application of the economic loss doctrine to commercial transactions, as originally expressed in *Neibarger*.

/s/ Brian K. Zahra